No. 95-2024

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

C. MARTIN LAWYER, III,
Appellant,

v.

THE UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Florida

MOTION TO AFFIRM OF SENATOR HARGRETT AND PRIVATE APPELLEES

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QUESTIONS PRESENTED

1. Can the appellant properly raise in this appeal his separation-of-powers/federalism claim when he admits that he did not raise it in the lower court, when he does not have standing to raise it on appeal even if he had done so in the lower court, and when its resolution would make no difference to the outcome of this case?

2. Even if the claim is properly raised in this appeal, did the District Court violate the principles of separation of powers or federalism by approving a redistricting plan that both houses of the Florida Legislature — in an effort to comply with *Miller v. Johnson*, 115 S.Ct. 2475 (1995) — proposed in their capacity as litigants in this case, particularly where the District Court did not preclude the legislature from adopting any other plan it chooses in formal session?

3. Where the supporters of the remedial redistricting plan — including all parties in this case except the appellant — presented extensive evidence that the proposed configuration was primarily the result of traditional districting factors that were not subordinated to race, and where the appellant introduced no evidence despite having an ample opportunity to do so, did the District Court commit clear error in finding that the plan is constitutional?

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Appellees Senator James T. Hargrett, Jr., Moease Smith, et al., and Robert Scott, et al., move, pursuant to Rule 18.6 of the Rules of this Court, to summarily affirm the judgment below on the ground that the appeal is so insubstantial as to require no further argument.

STATEMENT OF THE CASE

Summary of the Proceedings

This action was filed on April 14, 1994, by a number of plaintiffs, Robert Scott, et al., challenging District 21 of the districting plan for the Senate of the State of Florida. According to the allegations of the complaint, District 21 was the result of an "attempt to segregate the races for purposes of voting" that rendered the plan unconstitutional. Complaint ¶ 13. The

named defendants were the State of Florida and the United States Department of Justice. During the course of the proceedings, intervention was granted to the Florida Senate, the Florida House of Representatives, the Florida Secretary of State, District 21 Senator James T. Hargrett, Jr., and a number of black citizens, including residents of District 21, Moease Smith, et al.

In the midst of the litigation, this Court issued its decision in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), after which state officials considered their options in light of *Miller*. The Florida Legislature was not in session at the time and state officials chose not to call a special session. Given the import of *Miller*, they also chose not to plunge headlong into a costly and difficult liability defense regarding the pre-existing plan, but instead agreed — along with all of the other litigants — to attempt to negotiate a resolution of the case. These efforts resulted in a redistricting proposal drafted by state officials that included a markedly redrawn District 21 with a 36.2% black voting age population (VAP), down from its prior 45.0% black VAP. That proposal was supported by all of the parties — including the original plaintiffs who challenged the pre-existing plan, the State of Florida, the Florida Senate, the Florida House of Representatives, the Florida Secretary of State, Senator Hargrett, the United States Department of Justice, and the citizens who had intervened in defense of the original plan — except one, plaintiff C. Martin Lawyer, III. At the same time the proposal was submitted, all of the litigants stipulated to the Court that a prima facie case of unconstitutionality existed regarding the pre-existing plan. After the remedial plan was drafted and proposed to the Court by state officials, the Florida Attorney General submitted it to the United States Attorney General for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and preclearance was granted shortly thereafter. J.S. App. 5a-6a, 10a n.3; Guthrie decl. Tab 2 & ¶ 4,

in Def. Senate's Notice of Filing Decl. and Aff. (R. Doc. 188); November 20, 1995 transcript (R. Doc. 194) at 5.

With State Senate elections scheduled in 1996, the District Court moved expeditiously. An evidentiary hearing was held on November 20, 1995, after widespread public notice about the proposal and the hearing. At the hearing, all parties, as well as all members of the public, were invited to submit comments, evidence, and objections. No one objected to the displacement of the pre-existing plan or to the stipulation that a prima facie case of unconstitutionality had been made with respect to it. The sponsors of the proposed remedy presented extensive evidence regarding the non-racial factors that shaped the new plan. The only party who objected to that plan was Mr. Lawyer, who is an attorney and who chose to represent himself in objecting to the proposed plan. However, he presented no evidence beyond the plan's statistics and no witnesses to support his objection, and declined when offered the opportunity to cross-examine the person who drafted the proposed plan. Only one other person — a member of the public who is not a party — expressed any concerns about the remedial proposal. J.S. App. 15a; Nov. 20 tr. 26, 48-55; Guthrie decl.

After taking the matter under advisement, the District Court entered an order adopting the proposed plan, holding that it was constitutional under the standard set out in *Miller v. Johnson*. Nothing in the Court's conduct of the case prevented the Florida legislature from going into formal session and adopting a different plan, and nothing in the Court's order prevents the legislature from doing so in the future.

Evidence Supporting The Remedial Proposal

At the November 20 evidentiary hearing, the position of the supporters of the remedial proposal was outlined by attorney Benjamin H. Hill, III, representing the Florida Senate. Mr. Hill reviewed the various factors that led to the configuration of this

new plan and then placed into evidence, without objection and with the approval of the District Court, the relevant maps and statistics of the new plan, as well as various affidavits related to it. One of those was from John Guthrie, the Florida Senate's redistricting expert, who drafted the proposed plan on behalf of the state. Guthrie's affidavit and the attached tables and maps gave a detailed explanation of the reasons the proposal was drawn as it was. The District Court accepted Guthrie's affidavit as his direct testimony and offered all participants the opportunity to examine him further on the witness stand. Nov. 20 tr. 26.

Guthrie's affidavit made it clear that race was not the predominant factor in the drawing of the proposed plan, and that traditional redistricting factors had not been subordinated to race. More specifically, Guthrie demonstrated:

** The shape of District 21 and the surrounding districts in the new plan is not out of line with that of many of Florida's legislative districts. The end-to-end distance of the two most distant points in proposed District 21 is less than 50 miles, putting it 16th among Florida's 40 Senate districts in that particular measure of compactness. The Florida legislature has rejected, both formally and in practice, the use of compactness as a redistricting standard. Even so, bringing District 21 within the range of shapes normally utilized in the State was one of the goals underlying the drafting of the new plan. Guthrie decl. ¶¶ 4-6 & Tabs 9-12.

** The plan was designed to comply with the one-person, one-vote principle of the Fourteenth Amendment, *id.* ¶ 8, and with the contiguity standard of the Florida Constitution, which the Florida Supreme Court has interpreted to be met even where districts span a body of water. *Id.* at ¶ 9, *citing*, *In Re Constitutionality of Senate Joint Resolution 2G*, 597 So.2d 276, 279-280 (Fla. 1992). Several Florida Senate districts cross bodies of water. Guthrie decl. ¶ 9.

** One of the strongest reasons for drawing the proposal the way it was drawn was to comply with the traditional redistricting practice and important state interest of minimizing disruption and preserving the core of existing districts, while at the same time satisfying the constitutional concerns of the plaintiffs who challenged the pre-existing district. Florida's Senators are elected to four-year staggered terms. Odd-numbered districts, such as District 21, had elected Senators in 1992 and were scheduled to do so again in 1996. Even-numbered districts had last elected Senators in 1994 and were scheduled to do so again in 1998. A problem would have occurred if large numbers of people had been moved from an odd-numbered district, such as District 21, to an even-numbered district, thereby being unable for six years to vote for a Senator rather than going through the normal four-year cycle. If the plan were drawn in such a manner, special elections — and the disruption they entail — would have been required in the even-numbered districts as a means of preventing a widespread denial of the right to vote under state law. *See, In Re Apportionment Law*, 414 So.2d 1040, 1047-1050 (Fla. 1982). Most of the necessary adjustments could be made, and were made, by moving people from odd-numbered districts to other odd-numbered districts. Thus, some 235,875 people were moved from one district to another by the proposed plan, but only 3,225 of those were moved from an odd-numbered to an even-numbered district. Guthrie decl. ¶¶ 10-12, 19. In light of the de minimus nature of this latter number, special elections were not required under Florida law.

** The plan specifically was designed so that any changes did not favor either Republicans or Democrats, and the overall balance between Republican and Democratic registration in the new districts remained roughly the same as in the old. Guthrie decl. ¶ 18.

** One of the factors affecting the drawing of the plan was the decision to maintain proposed District 21 as a district composed primarily of people who had common interests

because of their low income, most of whom lived in urban areas. This group includes whites, blacks, and Hispanics, with whites being the predominant component. *Id.* ¶¶ 13-18.

** The Florida Legislature does not follow any principle of attempting to avoid the splitting of counties. Counties frequently are divided among two or more districts, sometimes where necessary to comply with the one-person, one-vote rule, but often for other reasons. For example, many Senators believe that having multiple representatives in the Senate provides counties with better representation. Only nine Senate districts are wholly contained within a single county, and five of those are in Dade County, where Miami is located. Under both the pre-existing plan and the proposed plan, 19 of Florida's 39 Senate districts are composed of portions of three or more counties. Proposed District 21's inclusion of parts of three counties — Hillsborough, Pinellas, and Manatee — is consistent with that and with redistricting combinations typically used in that area of the state. For example, Florida's House plan also includes a district combining portions of Hillsborough, Pinellas, and Manatee Counties, and includes another two districts combining portions of Hillsborough and Pinellas. *Id.* ¶¶ 20-22 and Tab 4.

** District 21 under the new plan would have a 36.2% black voting age population, and would be fair to all voters, with no group being excluded from meaningful participation in the political process. *Id.* ¶ 17.

Appellant's Response To The Evidence Supporting The Remedial Proposal

In contrast to Guthrie's detailed explanation, Lawyer submitted no affidavits, presented no evidence, and put on no witnesses at the November 20 hearing. Rather than respond to or challenge Guthrie's evidence, Lawyer chose not to cross-examine him. Instead, he relied solely upon the exhibits already

in the record, specifically those describing the proposed plan and showing that District 21 is 36.2% black in voting age population. Lawyer responded "yes" when asked by Judge Merryday: "So your litigation position is to equate the statistical composition with the prima facie showing of race-based districting?" Nov. 20 tr. 48. Chief Judge Tjoflat then invited Lawyer to present any evidence he had to support his claim:

> JUDGE TJOFLAT: You are free to put on any evidence that you have that race was the deciding factor in the fashioning of plan 386 as opposed to the totality of circumstances that Mr. Hill articulated in his presentation.

Id. 48. Chief Judge Tjoflat added:

> JUDGE TJOFLAT: Mr. Hill has summarized, in effect, what is in the record. There are affidavits in the record. If you want to examine Mr. Guthrie, you're free to do so, or call any witness you want.

Id. 49.

Lawyer then attempted to call as a witness Steven Mulroy, the attorney representing the United States Department of Justice. The Court held that the evidence was not relevant inasmuch as neither Mr. Mulroy nor the Department of Justice drew the plan, but instead the Attorney General had precleared the plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Nov. 20 tr. 50-51.[1] Lawyer did not call or attempt to call any other witnesses.

Despite the widely published notice of the proposed plan and the hearing, only one other citizen chose to object, former State Senator Helen Gordon Davis, who is not a party to the case. Speaking through her attorney, she conceded that the configura-

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[1] Lawyer's Jurisdictional Statement does not challenge the District Court's holding in this regard, or make any claim that there was anything unfair about the way the District Court conducted the evidentiary hearing itself.

tion of proposed District 21 "does not look overly bizarre" and that there is "no evidence of discriminatory intent" on behalf of the state officials who drew the plan. However, she contended that because of the crossing of county lines, "an inference can be drawn that race . . . is the overriding consideration." Under questioning from the Court, she agreed that the crossing of county lines occurs with some frequency in Florida and that this fact takes away what Chief Judge Tjoflat called "one stick . . . in your circumstantial evidence" against the remedial proposal. Nov. 20 tr. 54-55. No evidence was presented on behalf of former Senator Davis.

The District Court's Decision

On March 19, 1996, the District Court issued its decision holding that the proposed remedy is constitutional. All three judges joined in that conclusion with respect to the new plan. Judge Merryday's opinion for the District Court described and quoted at length this Court's elucidation in *Miller* of the burden required of any person challenging the constitutionality of a redistricting plan on the ground that traditional redistricting principles were subordinated to race. J.S. App. 11a-12a, *quoting, Miller v. Johnson*, 115 S.Ct. at 2488. The District Court noted that the Constitution, as interpreted by the majority in *Miller*, forbids a districting plan that is "motivated and dominated" by race. J.S. App. 14a.

Having quoted and discussed the *Miller* test, the District Court then evaluated both the pre-existing District 21 and the proposed remedy under that test. With respect to the pre-existing plan, the Court noted that it bears "some of the conspicuous signs of a racially conscious contrivance." J.S. App. 15a. By contrast, considering the geographic configuration and demographic composition of the proposed remedy, and in light of traditional districting considerations, the Court held that the remedy is constitutional and that Martin Lawyer had not made out his case to the contrary under *Miller:*

> Therefore, the conclusion is obvious that the plaintiffs allege a cognizable, constitutional dispute concerning *present* District 21, which bears at least some of the conspicuous signs of a racially conscious contrivance. On the other hand, it is equally obvious that a cognizable, constitutional objection to *proposed* District 21 is *not* established. In its shape and composition, proposed District 21 is, all said and done, demonstrably benign and satisfactorily tidy, especially given the prevailing geography.

J.S. App. 15a (emphasis added).

The District Court noted in its opinion that the pre-existing District 21 had uneven boundaries, but that they were not without precedent and were not the most extraordinary Senate district boundaries in Florida. J.S. App. 11a. In the course of evaluating the new proposed district under *Miller*, the Court pointed out that its boundaries were even less strained and much more regular than the district in the pre-existing plan. J.S. App. 17a. Taking into account the shape of proposed District 21 — which is within the mainstream of Florida's legislative districts — as well the racial composition of the districts in the new plan and the geographic realities of the area, the Court reiterated its conclusion regarding the constitutionality of the proposal. In so doing, the Court noted that the district had *not* been drawn based on racial or stereotypical assumptions, and had not been drawn to give one racial group control of the district over another:

> An observant and informed analyst of Plan 386 [the proposed plan] is not startled or impelled toward incredulity by the proposed district's configuration or composition. . . . [I]mportantly, Plan 386 offers to any candidate, *without regard to race*, the opportunity to seek elective office and both a fair chance to win and the usual risk of defeat — neither of which is properly coerced or precluded by the state, the court, or the Constitution.

> Candidates should compete and either win or lose based on their talent, their good fortune, and their views. Nothing about Plan 386 is determinative of an electoral outcome — because of race or otherwise.

J.S. App. 17a (emphasis added). The District Court concluded by reaffirming its "constitutional approval" based upon "applicable precedent," and said: "Plan 386 passes any pertinent test of constitutionality and fairness." J.S. App. 17a.

Chief Judge Tjoflat wrote a special concurrence in which he joined the unanimous conclusion that the proposed remedy is constitutional. J.S. App 19a. He differed with the majority only in his belief that the Court should find liability with respect to the pre-existing plan as a prerequisite to adopting the proposed remedy. He said that liability could be found based on the existing record and, therefore, that no impediment existed to adoption of the proposed plan. J.S. App. 19a-20a. By contrast, the majority held that an adjudication of liability was not necessary, but instead that the existence of a prima facie case of unconstitutionality was sufficient to trigger the Court's authority to adopt the proposed remedy, particularly given that no one had objected to the displacement of the pre-existing plan. J.S. App. 7a-10a.

It is from the Court's March 19 decision that Martin Lawyer takes his appeal.

ARGUMENT

Lawyer's jurisdictional statement breaks down his argument into three sections, the second dealing with his complaint about the District Court's failure to declare the pre-existing plan to be unconstitutional and to "remand" the case to the Florida Legislature, J.S. 16-21, and the first and third challenging the District Court's holding that the remedial plan is constitutional. J.S. 10-16, 21-24. We initially address the second argument

and then address the first and third in a combined fashion, since they are part and parcel of the same contention.

I. THE APPELLANT'S SEPARATION OF POWERS AND FEDERALISM CLAIM IS NOT AN APPROPRIATE SUBJECT FOR THIS COURT'S FURTHER REVIEW.

According to Lawyer, "the District Court neither declared the then-existing plan (Plan 330) unconstitutional nor remanded it to the legislature to await legislative action." Because of this, claims Lawyer, "[t]he District Court violated the principles of separation of powers and federalism by, in effect, convening its own legislative session (i.e., the mediation) which produced a new reapportionment plan without any subsequent legislative action by the government of the State of Florida." J.S. 19. He also contends that "[t]he resolution of this case by mediation precluded any additional evidence of motivation because the typical legislative process was substituted with a court-ordered mediation process." J.S. 17. He insists that the mediation was composed of "closed-door caucuses." J.S. 21.

Of course, this is not an issue about "separation of powers," even though Lawyer uses that terminology. Separation of powers refers to co-equal branches within the same national government or within the same state government, but it does not apply to relations between a branch of the federal government and a branch of a state government. That, instead, falls under the heading of federalism.

A. The Appellant Has Waived This Claim By Failing To Present It To The Trial Court.

Lawyer admits that "[t]his issue was not raised below." J.S. 19. Accordingly, it is not properly before this Court. *See, Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

The only explanation Lawyer provides is the following: "This issue was not raised below because Appellant Lawyer was represented by counsel who embraced the idea of a mediated 'settlement.'" J.S. 19. This is not a good excuse. Lawyer notes elsewhere in his jurisdictional statement that he is an attorney himself, and that he began representing himself prior to the presentation of any of the remedial proposals to the Court. J.S. 3-4. As he details in the jurisdictional statement, he filed his own objections to the proposed remedial plan. J.S. 4-5. He certainly could have raised the federalism objection at that time and it is disingenuous for Lawyer now to blame his former counsel for Lawyer's own failure to do so.[2]

B. Even If The Appellant Had Preserved The Issue, He Does Not Have Standing To Raise It, And The Resolution Of The Issue Makes No Difference To The Outcome Of The Case.

Even if he had raised the issue in the District Court, Lawyer does not have standing here to complain about the absence of a finding of unconstitutionality. From the beginning of this case, Lawyer sought to displace and abolish the pre-existing redistricting plan. The fact that the displacement occurred through the majority's approach, based upon the stipulation of a prima facie case, rather than through a declaration of unconstitutionality, as advocated by the concurrence, is of no practical or legal consequence to Lawyer. It might be of consequence to some-

[2] Having admitted that he failed to raise the issue, Lawyer then attempts to confuse the matter by stating that he did demand an adjudication of liability and that he "objected to the procedure adopted by the District Court." J.S. 20. However, as noted at J.S. 19, he did not raise the claim he raises here on the grounds he raises here — that the District Court violated principles of federalism not only by failing to adjudicate liability, but also by failing to "remand" the case to the legislature and by "convening its own legislative session (i.e., the mediation)." J.S. 19. Accordingly, the claim is not properly before this Court.

one who supported the pre-existing plan, and who contends it should remain in effect on the ground that there has been no declaration of unconstitutionality or action taken in a formal legislative session. However, no party to this case, and no member of the public, took that position at any time during the District Court proceedings, including the November 20 public hearing, and none have taken that position in an appeal to this Court.

Parties to a case in a trial court do not always have standing to raise particular issues on appeal. *See, Bender v. Williamsport Area School District*, 475 U.S. 534 (1986). Whether as a plaintiff in the trial court or an appellant on appeal, a party "must allege a distinct and palpable injury *to himself*." *Warth v. Seldin*, 422 U.S. 490, 501 (1973) (emphasis added). *See also, Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Thus, in *Diamond v. Charles*, 476 U.S. 54 (1986), this Court held that an intervenor did not have standing to seek review in this Court of a lower court decision declaring an Illinois abortion statute unconstitutional where the State itself chose not to seek review. As this Court stated, "the decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome.'" *Id.* at 62, *quoting, Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) Here, there is no injury to Lawyer stemming from the District Court's decision on the liability issue, and he has no direct stake in the outcome.

Indeed, the resolution of this issue would not make any difference in terms of the outcome of this particular case. If liability had been found on the existing record, as Chief Judge Tjoflat would have held and as Lawyer advocates on appeal, the District Court still would have done as it did with respect to the remedy, approving and adopting the plan proposed by state officials, including the Florida House and Senate in their capacity as parties in the case. This is demonstrated by the fact that the majority and Chief Judge Tjoflat agreed on the outcome of the case despite their differences on the liability issue.

Whether the view of the majority or of Chief Judge Tjoflat (and Lawyer) is correct on the liability question, the ultimate result is the same.

C. Even If The Appellant Had Preserved The Issue, And Even If He Had Standing To Raise It, His Claim Is Insubstantial.

Lawyer contends that the District Court should have "remand[ed]" the case to the Legislature. Of course, even when a redistricting case is before a federal court, a legislature does not lose whatever power it has to redistrict. So there is no need for a "remand." What is required is that when federal courts invalidate districting plans, they must defer to the legislature and allow it to design a remedy if it so chooses. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). But in so doing, the federal court cannot order the legislature into formal session. It can only give state officials the opportunity to convene the legislature in formal session if they desire. When legislatures choose not to act in formal session, the District Court must approve a new plan through remedial proceedings in the pending litigation.

In the present case, Florida officials examined their options after this Court's 1995 decision in *Miller*. They chose not to call a special session of the legislature, but instead proposed a remedial plan in their capacity as litigants in this case. With the 1996 elections approaching, the District Court acted properly in recognizing that no special session was imminent and in reviewing the plan proposed by state officials in the context of the litigation. None of the District Court's actions infringed upon the legislature's prerogatives or precluded it from exercising its power later to adopt some other redistricting plan.

Thus, contrary to Lawyer's contention, this was not "creation of legislation by the federal judiciary." J.S. 19. The plan was not drawn by the District Court, but by state officials —

including the Florida House and Senate in their capacity as parties in the case — who were joined by all other parties save Lawyer in recommending the plan to the Court.[3]

As explained in Section I-B above, the question of whether an adjudication of liability was necessary before state officials could propose a redrawing of the districts is *not an issue in this appeal* inasmuch as Lawyer does not have standing to raise it and the resolution of the issue would make no difference to the outcome of this case.[4]

Returning to Lawyer's "remand" argument, he notes that "even when a federal court properly devises and imposes a reapportionment plan, it only does so 'pending later legislative action.'" J.S. 19, *quoting Wise v. Lipscomb*, 437 U.S. at 540. He complains that the District Court's procedure "produced a new reapportionment plan without any subsequent legislative

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[3] Lawyer asserts that the mediation consisted of "closed-door caucuses." J.S. 21. Those caucuses, he says, prevented him from obtaining "evidence of motivation." J.S. 17. However, the mediation sessions generally were open to the press and the public in light of the importance of the issue, J.S. App. 15a, and Mr. Lawyer, as a party, had full access to the sessions — although he often did not attend. On occasion, the mediator would meet with one party out of the presence of others as a means for determining if differences could be bridged. But otherwise, the process was very public. Thus, nothing prevented Lawyer from obtaining "evidence of motivation." Moreover, the District Court offered Mr. Lawyer the opportunity to call witnesses and to cross-examine the principal drafter of the plan, yet he declined to do so. He is hardly in a position to complain about being denied evidence of the motivation of those who drew the plan.

[4] In addition, the claim in the text of Lawyer's jurisdictional statement about the failure to adjudicate liability is not fairly included in his "questions presented" page. His second question presented focuses only on the use of mediation to draw the new redistricting plan, and does not mention the failure to adjudicate liability as a prerequisite for displacing the prior plan. *See*, Rule 18 of the Rules of this Court, which incorporates Rule 14, including Rule 14.1(a), which reads: "Only the questions set out in the petition, or fairly included therein, will be considered by the Court."

action by the . . . State of Florida." J.S. 19. However, as noted previously, nothing that the District Court said or did takes away the legislature's power to adopt another plan subsequent to the District Court's ruling. Here, the legislature has chosen not to take what Lawyer calls "subsequent legislative action," as is its prerogative. If Lawyer wants the legislature to take "subsequent . . . action," his recourse is to lobby the legislature, not to seek reversal of the District Court by this Court.

Indeed, rather than promoting federalism, Lawyer's approach would contravene it. Lawyer's "remand" language suggests that the District Court should have ordered the legislature into special session even though State officials chose not to take that path, and the District Court should order the legislature to take "subsequent . . . action" even though the legislature has determined otherwise. Under principles of federalism, the District Court does not have the power to do what Lawyer now suggests it should have done.

In this case, the District Court considered the remedial proposal to be a legislative plan. J.S. 16a. In other circumstances, there might be an issue of whether such a plan — designed and proposed by state officials, but adopted outside of a formal legislative session — should be treated as a "legislative" or "court-ordered" plan. *Wise v. Lipscomb*, 437 U.S. at 544, suggests that it should be considered a legislative plan, as does *McDaniel v. Sanchez*, 452 U.S. 130 (1981). However, that question need not be resolved in this appeal since it has not been raised by Lawyer and is of no consequence in this case. The question does not matter for purposes of whether preclearance under Section 5 is necessary, *see, McDaniel v. Sanchez*, since preclearance was obtained anyway. It does not matter in terms of whether the remedial standards for court-ordered plans are appropriate, *see, Connor v. Finch*, 431 U.S. 407, 414 (1977), since the new remedy lives up to those standards inasmuch as it utilizes single-member districts, has a low overall population deviation of 1.6%, and does not dilute

minority voting strength. *See, id.* at 414, 422-426 and n. 21. While the District Court here exhibited deference to the proposal as if it were a legislative plan, J.S. App. 16a, that sort of deference to state policies is also required in a court-ordered plan. *Upham v. Seamon*, 456 U.S. 37, 41-43 (1982); *White v. Weiser*, 412 U.S. 783, 794-795 (1982). Indeed, the proposed remedy does what this Court has required in *Upham* and *Weiser* with respect to court-ordered plans: it has altered the pre-existing plan only as much as is necessary to cure any purported violation, [illegible] left the remainder of the plan in place with a minimum of disruption.

Certainly, this is an unusual case. But the District Court handled it with care, giving ample notice to the parties and the public, and providing a full opportunity for all to be heard. To the extent this case raises questions that someday may be in need of resolution by this Court, that resolution should come in a case where the questions are properly raised and where they make a difference to the outcome. This case does not meet these criteria. Moreover, a summary affirmance by this Court affirms the judgment, but by its nature does not necessarily endorse the reasoning of the District Court. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Since the federalism issues raised by Lawyer on appeal make no difference to the ultimate judgment, there is no need to note probable jurisdiction.

II. THE APPELLANT HAS NOT DEMONSTRATED THAT THE DISTRICT COURT'S FINDING REGARDING THE PROPOSED REMEDY IS IN ERROR, MUCH LESS THAT IT IS CLEARLY ERRONEOUS.

With respect to the first and third issues raised by Lawyer in his jurisdictional statement, it was his burden to prove in the District Court that the plan is unconstitutional. Not only did he fail to carry the burden, he failed even to go forward with proof. When the supporters of the plan introduced evidence from John

Guthrie detailing the myriad factors that led to the plan, Lawyer did nothing to meet or contradict that evidence, and he specifically declined the District Court's invitation to examine Guthrie.

The District Court's determination of constitutionality cannot be reversed unless clearly erroneous. *See, Rogers v. Lodge*, 458 U.S. 613, 622-627 (1982). *See also, Miller v. Johnson*, 115 S.Ct. at 2488 ("the District Court . . . finding . . . was not clearly erroneous"). In voting rights cases, this Court often has emphasized that district courts are more familiar with the relevant locality — including traditional districting principles utilized in the jurisdiction and related geographic factors — than is this Court. As noted in *White v. Regester*, 412 U.S. 755, 769-770 (1973):

> [W]e are not inclined to overturn [the district court's] findings, representing as they do a blend of history and [a] local appraisal of the design and impact of the . . . district in the light of past and present reality, political and otherwise.

See also, Clark v. Roemer, 500 U.S. 646, 659 (1991) (local districts courts in voting cases are more familiar than this Court "with the nuances of the local situation").

Since *Shaw v. Reno*, 509 U.S. 630 (1992), this Court's holdings that specific redistricting plans are subject to strict scrutiny have come only in cases where the district courts first made particularized findings, based on the evidence, that race was the predominant factor in disregard of traditional districting criteria. *See, Miller v. Johnson*, 115 S.Ct. at 2488-2490; *Shaw v. Hunt*, 116 S.Ct. 1894, 1901 (1996); *Bush v. Vera*, 116 S.Ct. 1941, 1951-52 (1996). By contrast, where a district court has examined the evidence in light of the proper evidentiary standard and has held that race did not predominate in disregard of traditional factors, this Court has affirmed and has not imposed strict scrutiny. *See, Dewitt v. Wilson*, 856 F.Supp. 1409, 1413 (E.D. Cal. 1994), summarily aff'd, 115 S.Ct. 2637 (1995). Given the complexity of drawing redistricting plans and the deference properly accorded state officials in that process, *see, Miller*, 115 S.Ct. at 2488, it should be the extremely rare case in which a district court is overturned after concluding that the *Miller* standard has not been met by a plaintiff challenging a redistricting plan.

In the trial court, Lawyer rested his case primarily on the numbers in District 21, specifically agreeing with Judge Merryday's observation at the November 20 hearing that Lawyer's position was "to equate the statistical composition [of the district] with the prima facie showing of race-based districting." Nov. 20 tr. 48. District 21 is 36.2% black in voting age population. In this Court, Lawyer claims that the "districting of Senate District 21 was not race-neutral, and that the driving force behind its creation was to effectuate the perceived common interests of one racial group — African-Americans." J.S. 11.

Lawyer contends here that this claim is supported by the shape of the district, J.S. 22, the fact that it goes beyond Hillsborough County, J.S. 22-23, the district's alleged non-contiguity, J.S. 23, the alleged lack of compactness resulting from going outside of Hillsborough County, J.S. 24, and what Lawyer calls "a black-maximization policy which assumed that black voters in [the three] counties had a community of interest." J.S. 24.

However, as noted above in the Statement of the Case, the District Court examined all of these things — the statistical composition of the district, the shape, the compactness, the geography (including the presence of Tampa Bay), and the multi-county composition — under the *Miller* standard, and disagreed with Lawyer. In terms of composition, shape, and compactness, the District Court found that the district is "demonstrably benign and satisfactorily tidy, especially given the prevailing geography." J.S. 15a. *See also* J.S. 11a, 17a.

The Court noted that the crossing of county boundaries and water in Florida, and particularly in the Tampa Bay area, is a fact of redistricting life. J.S. 13a-14a. The Court held that this 36.2% black district is not indicative of what Lawyer calls "a black-maximization policy," but instead "offers to any candidate, *without regard to race*, the opportunity to seek elective office, and both a fair chance to win and the usual risk of defeat." J.S. App. 17a (emphasis added).[5] Particularly in light of his failure to present evidence, Lawyer cannot demonstrate on appeal that the District Court's finding of constitutionality was error, much less clear error.[6]

Indeed, there is substantial evidence supporting the District Court's finding. As indicated by Appendix F to Lawyer's petition and the Guthrie affidavit, the district is composed of areas primarily adjacent to and on either side of Tampa Bay — designed to create a low-income urban district populated mostly by citizens of Tampa and St. Petersburg who live near the cross-bay downtown areas of those cities.[7] The fact that the district

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[5] It is of some relevance that all of the diverse parties — except Lawyer — have agreed to the remedial plan. These parties include not only those who defended the pre-existing plan, but also those plaintiffs (other than Lawyer) who challenged it, claiming that it was an "attempt to segregate the races for purposes of voting." Compl. ¶ 13. In contrast to their views about the pre-existing plan, these plaintiffs do not believe that the remedy is an attempt to segregate or classify by race.

[6] The District Court examined Lawyer's evidence under the *Miller* standard. Since that time, this Court has decided *Bush v. Vera* and *Shaw v. Hunt*. Neither of those cases alter the *Miller* standard in any way relevant to the present litigation.

[7] The remedy contains the same Manatee County configuration in the southern part of the district that was present in the pre-existing plan. The reason for this is clear from looking at the maps. J.S. 29a-30a. If the Manatee County portion of District 21 were deleted, it would have to be absorbed by the surrounding District 26, which is an even-numbered district not scheduled for elections until 1998. A special election would be required

has a 36.2% black voting age population rather than some different percentage does not mean — as Lawyer contends — that the predominant motivation was to "effectuate the perceived common interests of . . . African-Americans." J.S. 11.

Lawyer seems to be claiming that the black percentage in the overall district cannot exceed the black percentage in any of the counties from which portions of the district come. J.S. 23. However, communities in counties are not grouped so that each reflects the identical racial composition of the county at large. Any suggestion by Lawyer that a district's black percentage cannot exceed that in any of the overall constituent counties would institutionalize a sort of racial proportionality that cuts against the grain of *Miller, Shaw v. Hunt*, and *Bush v. Vera*.

Lawyer contends that he has proven the predominance of race from the fact that the district goes outside of Hillsborough County and crosses Tampa Bay to do so, thereby destroying its contiguity according to him. J.S. 22-23. Of course, with 40 senate districts and 67 counties, it is impossible to keep all districts within a single county. Florida does not require districts within a single county, and traditional practices favor multi-county districts. As Guthrie testified, only 9 of the state's 40 senate districts are located within a single county, and 5 of those come from Dade County. Guthrie decl., ¶¶ 20-22. And while Lawyer asserts that the crossing of a body of water makes District 21 noncontiguous, Florida law is to the contrary. The Florida Supreme Court has said:

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under Florida law so those who were in District 21 would not have to wait two more years before exercising their right to vote. See p. 5 above. Moreover, the ripple effect likely would cause other special elections in other even-numbered districts. In addition, a precipitous change like that could affect the delicate partisan balance between Republicans and Democrats. Thus, the need for stability and continuity — while still correcting the alleged violation — justified maintaining Manatee County as it was in the pre-existing plan.

> We hold . . . that the presence in a district of a body of water without a connecting bridge, even if it necessitates land travel outside the district in order to reach other parts of the district, does not violate this Court's standard for determining contiguity under the Florida Constitution.

In Re Constitutionality of SJR 2G, 597 So.2d 276, 280 (Fla. 1992).

As for Lawyer's claims about shape and compactness, Guthrie's affidavit demonstrates that District 21 is within Florida's tradition and practice in terms of these factors, and Lawyer has presented nothing to contradict that.

In light of all of this, the District Court was on firm ground when it examined the evidence under the *Miller* standard and found the proposed remedy to be constitutional. Lawyer wants this Court to micro-manage Florida's Senate redistricting by undertaking a de novo review of the very task that is properly entrusted to the District Court. He is hardly in a position to do that, particularly given that he did not present any evidence or question any witnesses regarding his claim that this plan was the result of a predominant racial motivation. Moreover, if plenary review is routinely granted by this Court based upon the types of contentions Lawyer makes here, this Court may find itself evaluating the details of every congressional or state legislative district in the country that someone chooses to challenge before a three-judge district court as oddly-shaped and racially motivated. The District Court properly disposed of this issue in the present case and Lawyer has done nothing to demonstrate that the District Court's action was clearly erroneous.

CONCLUSION

For the foregoing reasons, the motion to affirm should be granted.

Respectfully submitted,

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